

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	
Opinion Requested by:	)	No. 85-001
	)	August 20, 1985
Thomas L. Legan	)	
County Supervisor	)	
County of Santa Clara	)	

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BY THE COMMISSION: We have been asked the following question by Thomas L. Legan, Supervisor for Santa Clara County:

May Supervisor Legan participate in deliberations by the Board of Supervisors on a proposed County General Plan Amendment which would approximately double the currently allowable density on nearly 1,000 hillside acres owned by his employer, Kaiser Cement Corporation?

CONCLUSION

Supervisor Legan must disqualify himself from participating in any way in the Board of Supervisors' deliberations on the proposed County General Plan Amendment since it would increase the current fair market value of his employer's property by more than \$250,000, the best estimate being by approximately \$2.9 million. This constitutes a reasonably foreseeable material financial effect as to Kaiser Cement, which is distinguishable from the proposed amendment's effect upon the public generally.

FACTS

Thomas L. Legan is a member of the Santa Clara County Board of Supervisors. He is an employee of Kaiser Cement Corporation and manager of its Rock Products Division at its local Permanente Plant. In addition, through the company's profit-sharing program, Supervisor Legan owns more than \$1,000 of the company's stock. Kaiser Cement Corporation (hereinafter "Kaiser") is traded on the New York Stock Exchange, but is not among the "Fortune 500" companies.

Supervisor Legan has proposed a modification to a provision of the County's General Plan (the "Hillside Density

Amendment"). The amendment, if adopted by the Board of Supervisors, would increase the number of dwelling units which could be built on certain large parcels of undeveloped property situated in the County's "Hillside Zone" ("Hillside" properties).

The proposed Hillside Density Amendment would alter the computation formula for slope density requirements and thereby permit more density in the "cluster" type residential development permitted on hillside property.<sup>1/</sup> The net result would be that certain parcels could be developed to a greater degree than under the present General Plan.

Because of the nature of the proposed Hillside Density Amendment, it is only those parcels of 40 acres or more which will be affected by the proposed change. Within the Hillside Zone, 742 parcels are in excess of 40 acres. This represents 0.9% or less of all the parcels in the unincorporated area and less than 0.25% of all parcels in the County.<sup>2/</sup>

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<sup>1/</sup> The County Zoning Ordinance and General Plan provide for clustering of homesites in the Hillside Zone as follows:

In order to utilize the number of building sites determined by the 20-160 acre slope density formula, the project must be designed as a cluster and must permanently preserve at least 90% of the land area as open space. The clustered home sites shall not have lots of less than 2 acres in size.... At least 90% of the gross land area shall be permanently preserved as open space through easements and shall be configured as large, usable and contiguous areas.

<sup>2/</sup> The County consists of a total of 830,000 acres, comprised of 383,701 parcels, including parcels within the incorporated cities. Approximately 20% to 30% of all parcels (76,000 to 115,000) are in the unincorporated areas of the County, constituting approximately one half the total area of the County (415,000 acres). The Hillside Zone comprises approximately 180,000 acres split into a total of 4,773 parcels of land, with an average size of 37.5 acres. However, the actual size ranges from 2.5 acres to more than 600 acres. Of the 180,000 Hillside acres, 95,000 are in parcels of 40 acres or more, the remaining 85,000 acres are in smaller parcels.

Kaiser owns an estimated 3,260 acres of land in the hillside area, approximately two-thirds or three-fourths of which is located in the Hillside Zone. Of Kaiser's hillside lands, it is only the portions which are outside the cities of Cupertino and Palo Alto and also outside the use permit area for a quarry and cement plant which Kaiser operates on these lands that are being focused upon. The affected portion of Kaiser's lands totals 1,001 acres, of which 967 acres consist of parcels of 40 acres or more which would be impacted by the proposed Hillside Density Amendment.

The County staff has projected the potential effect upon the 967 acres of Kaiser land which would be affected. Under one proposal, the 15-120 curve, 32 dwelling units could be constructed as opposed to the maximum 22 under current rules. Under the 10-80 curve, even more (41 dwelling units) could be constructed if maximum permissible development were achieved, a net increase of 19 potential units on the Kaiser property.

Kaiser currently utilizes the 967 acres (and other lands) as a "buffer zone" between its quarry and cement plant operations and neighboring properties. We are told that Kaiser fully intends to continue to utilize the acreage in this fashion for the foreseeable future.<sup>3/</sup> In addition, the County Counsel has pointed out that numerous additional discretionary governmental approvals and permits would be required before development to the maximum extent permitted by the Hillside Density Amendment could be achieved on the 967 acres.<sup>4/</sup>

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<sup>3/</sup> Kaiser Cement has expended "vast sums of money" to revamp its Permanente Cement Plan in recent years and is likely to continue its cement plant and quarry operations. These assertions have been made by Mr. Clark, County Counsel for Santa Clara County and by Loren Levitt, Assistant Assessor for Santa Clara County. We have received a direct statement from Kaiser which states that Kaiser's "current plan" is to hold the property as buffer land for its cement plant.

<sup>4/</sup> Among the discretionary governmental approvals involved are those required by the Subdivision Map Act, California Environmental Quality Act, County Zoning Ordinance, County Cluster Permit Ordinance and the County's requirement of a preliminary development plan.

### ISSUES PRESENTED

The following are the essential issues to be resolved by this Opinion request.

(1) Whether it is reasonably foreseeable that a decision on the Hillside Density Amendment will have a material financial effect upon Kaiser as a result of a change in the fair market value of its assets. We have been asked by Supervisor Legan to consider in our analysis of this question:

(a) Whether, and if so to what extent, we should take into account the intentions and the probability of Kaiser to continue to use the acreage in question as it is used currently; i.e., as an undeveloped buffer zone for its quarry.

(b) Whether, and if so to what extent, we should take into account the intervening discretionary governmental approvals which would be required in order for Kaiser or any subsequent owner to convert the current buffer/open-space use into the greater-density residential use which would be permitted by the Hillside Density Amendment, should it be approved.

(2) Whether the "public generally" in this instance is drawn only from the unincorporated areas of the County or from the County as a whole.

(3) Whether any foreseeable effect upon Kaiser will be distinguishable from the effect upon the general public. And more specifically, whether the owners of hillside property or the owners of hillside parcels of 40 acres or more constitute a "significant segment" of the general public.

### ANALYSIS

Supervisor Legan is a public official within the meaning of the Political Reform Act (the "Act").<sup>5/</sup> Section 87100 provides as follows:

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<sup>5/</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code. For the Act's definition of "public official" see Section 82048.

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

This section prohibits officials from making decisions which will affect their own pocketbooks. In addition, Section 87103 defines certain "indirect" financial interests which are also prohibited.

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

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(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

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Supervisor Legan has an investment in Kaiser of \$1,000 or more (Section 87103(a)); he has received more than \$250 in income from Kaiser Cement in the last 12 months (Section 87103(c)); and he is an employee and manager for Kaiser, at the affected plant (Section 87103(d)). Any one of these economic

interests standing alone would be sufficient to create the basis for a potential disqualification relative to Kaiser Cement.

Having concluded that the requisite economic interest is present, we turn to the matter of whether the reasonably foreseeable effects of the Hillside Density Amendment decision will be both material as to Kaiser and distinguishable from the effects upon the public generally.

QUESTION #1 - Reasonably Foreseeable  
Financial Effect - Materiality

Initially, it is important to our analysis to remember that we are not examining the materiality of an effect upon an interest in real property owned by an official, either directly or indirectly. Therefore, we must focus on the issue of the materiality of the effect upon Kaiser, a business entity which has other real property holdings. The Commission has recently adopted a new regulation, 2 Cal. Adm. Code Section 18702.2, which provides guidelines for determining when an effect on a business entity is "material" within the meaning of Section 87103. In pertinent part, that regulation reads as follows:

(a) This section shall be used to measure whether the reasonably foreseeable effect (whether direct or indirect) of a governmental decision will be material as to a business entity in which an official has an economic interest.

(b) An official has an economic interest in a business entity if one or more of the following criteria are met:

(1) The business entity is a source of income (including gifts) aggregating \$250 or more provided to, received by or promised to the official within the preceding 12 months.

(2) The official has a direct or indirect investment worth \$1,000 or more in the business entity.

(3) The official is a director, partner, employee, trustee of, or holds any position of management in, the business entity.

(c) The effect of a decision on any business entity listed on the New York Stock Exchange or the American Stock Exchange will be material if:

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(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$250,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 500 largest U.S. industrial corporations or the 500 largest U.S. non-industrial corporations, in which case the increase or decrease in assets or liabilities must be \$1,000,000 or more.

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Since Kaiser Cement is traded on the New York Stock Exchange, but is not one of the Fortune 500 companies, we can see that the applicable guideline is whether or not the reasonably foreseeable effect of the decision will be to increase or decrease Kaiser's assets or liabilities by \$250,000 or more.

We must now look at the Hillside Density Amendment's effect upon Kaiser's assets. Generally, it is assumed that the permitted use of land is an actual potential use, absent a showing to the contrary.<sup>6/</sup> Thus, Hillside Zone property which

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<sup>6/</sup> In arriving at the value of the land, as well as other interests in realty, it is generally proper to take into consideration every use to which it is naturally adapted and that will enhance its value in the estimation of persons generally, purchasing in the open market. The question is not what its value is for a particular purpose, but its value in view of all the purposes to which it is naturally adapted. All elements must be considered that combine to establish its market value. All the land's capabilities, or the uses to which it is adapted, should be taken into consideration, not merely the owner's current use. The highest and most profitable use is to be considered, however, only to the extent that the prospect of that use affects the market value of the land, and uses that are not reasonably probable should be excluded.

51 Cal. Jur. 3d, Property Taxes,  
Sec. 78, p. 182.

is zoned to permit housing of a particular density will be assumed to be potentially useable to that level.<sup>7/</sup> For residential property, an increase in the permissible density normally will result in an increase in the property's fair market value.

Turning to the reasonably foreseeable financial effects emanating from the decision, the County Assessor's office estimates that the parcels in question are currently worth approximately \$3,000 per acre or a total of \$2,910,000 (for 967 acres).<sup>8/</sup>

This estimate of \$2.9 million was made by Mr. Loren Levitt, Assistant County Assessor, who has, in the past, been involved personally in Assessor's appraisals of the property in question.

The figures utilized by Mr. Levitt were based on information from Mr. Craig Britton with the Mid-Peninsula Regional Open Space District ("MPROSD"). According to the County Assessor, "almost all the land in that area is bought by Mid-Peninsula."

Mr. Craig Britton of MPROSD confirmed that his best estimate of the current fair market value is approximately \$3,000 per acre. It is his belief that a doubling of the permissible density from 22 dwellings to 41 dwellings would approximately double the property's value.

The property's current low fair market value of \$3,000 per acre obviously takes into account that Kaiser has a quarry

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<sup>7/</sup> The Santa Clara County Staff Analysis (Dec. 18, 1984, see pp. 1-2) of the proposed Hillside Density Amendment as to the need for preparation of an Environmental Impact Report, concluded that such a report was required, in part because of the probable increase in the intensity of the use of such property resulting from the increase in permitted density.

<sup>8/</sup> Originally, it was thought that an Environmental Impact Report (EIR) would be prepared on the proposal and the EIR would contain an economic analysis which might assist us in making a determination. However, the EIR was not prepared, because, with Supervisor Legan abstaining pending our opinion, the Board of Supervisors deadlocked 2-2 on the issue.



operation nearby<sup>9/</sup> and the fact that the density permitted is very low, requiring many acres per dwelling unit. This, in turn, holds down the magnitude of the increase in fair market value (doubling a smaller number results in a lower total than doubling a larger number). Even so, the estimated increase in value is over ten times the amount in the guideline for "materiality" of increases in assets for companies of Kaiser's size. Even if this estimate is somewhat high, it is clear that the increase is well over \$250,000 and thus, it will clearly be a material effect upon Kaiser. (See, 2 Cal. Adm. Code Section 18702.2, supra.)

A. The Effect, if any, of Kaiser's Intended or Probable Future Use of the Property

The Act requires that fair market value be utilized in valuing "goods, services, facilities or anything of value." Section 81011. The intent of the section is to use current fair market value and the effect of a decision will be measured by the effect upon current fair market value.

However, an argument has been put forward to the effect that the anticipated increase in the current fair market value of the property should not be fully attributed to Kaiser. This argument is based upon the premise that Kaiser will continue to retain the parcels in question as part of an undeveloped "buffer" for its quarry and cement plant operations. Consequently, the County Counsel and the Assessor's Office have argued that the present value to Kaiser of the increased permissible density, which probably would only be utilized at a future date, is less than the actual increase in current fair market value.

There are several problems with considering such an approach. First, we must look at the objective effect upon the value, not whether the owner will act to realize the increased value by selling or developing the property. The second problem is that there is no guarantee that Kaiser won't change its use of the property once the decision has been made and the benefit conferred. Kaiser has indicated that there are no legal restrictions on its use or sale of the land and that the land is

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<sup>9/</sup> The current low fair market value also would take into account the fact that it is anticipated that Kaiser will continue to operate the neighboring quarry for a number of years into the future, with the attendant impact upon aesthetics.

unencumbered by any debts. The day following the rezoning a buyer might make an offer that Kaiser "can't refuse" because of the increased value. Therefore, we can only look instead to the decision's effect upon current fair market value.<sup>10/</sup>

However, Kaiser's intended and probable usage of the quarry will have an impact upon the market price for the adjacent parcels, both before and after the decision. Because the parcels in question are located in the vicinity of the quarry, they may well be less desirable for housing and may well not appreciate in price as much as similar parcels which are not located as near to the quarry. This was taken into account, in the evaluation of the property's current fair market value, as discussed previously.

We cannot accept the "Present Value Discounted" approach proposed by the Assessor's Office for several reasons. First, it conflicts with the approach used in all other situations, where we look at the effect on current fair market value. Second, it is based upon the assumption that Kaiser cannot (or will not) alter the use of the property (including selling it) as an undeveloped buffer for a period of 30 years.<sup>11/</sup> We have received information from Kaiser which

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<sup>10/</sup> In the case of Cogan v. City of Los Angeles (1973), 34 Cal. App. 3d 516, at 521-22, the Court quoted from its earlier ruling in Howard Park Co. v. City of Los Angeles (1953), 119 Cal. App. 2d 515, 519, as follows:

We are constrained to hold that a special use to which property is put cannot be considered as affecting the amount of benefits, but that such amount is to be measured by the benefit which would be received by the property if devoted to any use which might reasonably be made of it. It would be inequitable and unfair to exempt particular property from an assessment when a special use is voluntarily made of it by the owner, and which he may change at any time so as to reap the benefits of an improvement that does not, at the time an assessment is made, benefit him because of a special use to which he has voluntarily put his property.

<sup>11/</sup> The development of the land in accordance with the "cluster" development requirements would, in and of itself, result in 90% (or approximately 900 acres) of the subject Kaiser parcels being dedicated for permanent open-space usage.

indicates there are no legal restrictions on either a sale or a change in use (other than the governmental approvals required for the latter, which will be discussed later).

Third, by making slight manipulations in the basic assumptions about interest rates and the period of time over which a discount is to be calculated, it is possible to achieve substantially differing "present values" for the same \$2,901,000 incremental change in current fair market value.

It seems clear to us that: If the current fair market value goes up by \$2,901,000, Kaiser Cement's assets have been increased by that sum. In addition, the doubling in current fair market value is some evidence that the land is suitable for development for housing now since a change in density would not tend to increase the value of property totally unsuited for housing. Consequently, we conclude that the relevant factor is the effect upon the current fair market value, not some estimation of "Present Value Discounted."

B. The Effect of Intervening Discretionary  
Governmental Approvals

An argument has also been made that an increase in the value of the property is not reasonably foreseeable because numerous discretionary governmental approvals are required before any development of the property could occur.<sup>12/</sup> Thus, development of more housing is only speculative because these other approvals have not yet been obtained.

The need for the governmental approvals required for development already exists and would be required for anyone to develop the property with the number of residences which would currently be permitted. The necessity of obtaining such approvals and the costs (both monetary and time) required to do so will be factored into the property's current fair market value.

Those same factors would also be considered in determining the revised fair market value of the property if the Hillside Density Amendment is approved. We have not been provided with any information to indicate that obtaining such approvals would be more difficult in the one instance than in the other. Therefore, the issue of governmental approvals is

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<sup>12/</sup> See fn. 4, supra for an enumeration of some of those approvals.

similar in either situation and will simply be a factor in both the current and future assessments of the fair market value of the property.<sup>13/</sup> Consequently, we conclude that the reasonably foreseeable financial effect of the proposed Hillside Density Amendment upon Kaiser Cement is material since the affect upon current fair market value will exceed \$250,000.

QUESTION #2 - The Public Generally

Having concluded that the reasonably foreseeable effects upon Kaiser Cement from the Hillside Density Amendment will be material, there remains the question of whether this effect will be distinguishable from the effect of the decision on the public generally. Section 87103. The term "public generally" is defined by a Commission regulation (2 Cal. Adm. Code Section 18703) to include a "significant segment of the public." However, for purposes of this question we must first determine what "public" we are dealing with.

Traditionally, the Commission has considered the "public" to consist of the entire jurisdiction of the agency in question. This is consistent with the disclosure provisions of the Act.

Thus, in the case of the Santa Clara County Board of Supervisors, the "public" would consist of the entire County of Santa Clara, even though its primary land use jurisdiction is confined to the unincorporated areas of the County. The "public" includes the entire jurisdiction for the agency in question, particularly where an elective body is being considered, because all of the County's residents are constituents of the various members of the Board of Supervisors and many reside in the various incorporated cities within the County. They are all impacted in one way or another by the County's land-use decisions, even if not directly subject to the County's land-use jurisdiction. We see no reason to alter our interpretation that the residents, and businesses and property owners of the County of Santa Clara are the "public" for purposes of decisions being made by the Board of Supervisors.

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<sup>13/</sup> For example, if the property were located in a flood plain where nothing could be built unless the flood plain designation was removed by the Federal Government, an extremely unlikely prospect, then this "intervening governmental approval" would affect both its current value and any future value.

We turn next to how we measure the "public" in this situation.<sup>14/</sup> We are told that there are 383,701 parcels of land within the County, totalling 830,000 acres.<sup>15/</sup> The Hillside Zone comprises approximately 180,000 acres, divided into 4,773 parcels, of which only 742 are of 40 acres or more and therefore will be affected by the proposed Hillside Density Amendment. Given that the effect on Kaiser will be \$2.9 million, and that only a small percentage of property owners or parcels will be affected at all (and most of those by considerably less than \$2.9 million) the effect on Kaiser will clearly be distinguishable from the effect upon the public generally.

QUESTION #3 - Do Owners of Hillside Property Constitute a "Significant Segment" of the General Public

Even if Kaiser Cement will be affected in a manner distinguishable from "all members of the public," disqualification will not be required if:

... The decision will affect the official's interest [Kaiser] in substantially the same manner as it will affect ... a significant segment of the public.

2 Cal. Adm. Code Section 18703(a)

In its Ferraro opinion (No. 78-009, 4 FPPC Opinions 62, Nov. 7, 1978) the Commission stated:

In order to be considered a significant segment of the public, we think a group usually must be large in numbers and heterogeneous in quality.

Id. at 67.

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<sup>14/</sup> We do not have population figures nor the actual number of owners of parcels. In the past, we have used whatever figures we were best able to ascertain and which were relevant to the issue at hand. In this case, the number of parcels is known, and because a land-use decision affecting only certain parcels is involved, it is an appropriate number to utilize.

<sup>15/</sup> Approximately 20 to 30% (i.e., more than 100,000) of all the parcels are in the unincorporated areas of the County.

In order to determine which group we are focusing on as a possible "significant segment" we must first determine which group, if any, will be affected "in substantially the same manner" as Kaiser.<sup>16/</sup> Of all the Hillside property, only 738 parcels of 40 acres or more may be affected in substantially the same manner as Kaiser's four parcels. We have no information regarding this group of parcels except that all are 40 acres or more and would have their density limitations doubled by the proposed action. Assuming that each parcel has a separate owner, only 738 property owners among 383,000 property owners in the County may be affected in substantially the same manner as Kaiser.<sup>17/</sup> The other 4,029 Hillside property owners will be unaffected by the Hillside Density Amendment and, hence, not in "substantially the same manner" as Kaiser. Consequently, the 4,773 hillside parcel owners are not the group upon which we must focus.

The only group which will be affected in substantially the same manner as Kaiser is the owners of the other 738 Hillside parcels of 40 acres or more. This group has neither the numerical size nor the heterogeneity to constitute a significant segment of the public within the meaning of 2 Cal. Adm. Code Section 18703.<sup>18/</sup>

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<sup>16/</sup> See also, Owen Opinion, (No. 76-005, June 2, 1976, 2 FPFC Opinions 77, at 81 and fn. 4; and Overstreet Opinion (No. 80-010, March 2, 1981, 6 FPFC Opinions 12 at 18).

<sup>17/</sup> We should point out that if the magnitude of the effect upon Kaiser would be substantially greater (or lesser) than the magnitude of the effect upon the other 738 owners, the effect would not be in "substantially the same manner." See Gillmor Opinion (No. 76-089), 3 FPFC Opinions 38 at 43, fn. 5, April 6, 1977.

<sup>18/</sup> See, Owen Opinion, supra at 81-82; and Ferraro Opinion, supra at 67; and Gillmor Opinion, supra, at 43 fn. 5. This conclusion would not be altered even if we considered the public to be only those property owners within the unincorporated areas of the County; 738 is just too small a group in comparison to approximately 100,000 other property owners to be considered a "significant segment." Furthermore, owners of parcels of 40 acres or more may not have the diversity necessary to constitute a "significant segment" of all property owners when the vast majority of those property owners are merely residential owners of small lots. Owners of 40 acres or more may be investors, businesses or developers.

CONCLUSION

We conclude that:

(1) The effect of the decision will be material as to  
Kaiser;

(a) The intended or probable use for property potentially benefited or harmed by a decision is not considered in the analysis of the reasonably foreseeable effects of a decision. The decision's effect upon the property's current fair market value is the appropriate test.

(b) Intervening discretionary governmental approvals required for development of property will be considered on the question of foreseeability only to the extent that their likelihood is significantly altered by the decision, otherwise they will be considered in the context of materiality only as they affect current fair market value.


(2) The "public" is all the persons residing, owning property, or doing business, in the jurisdiction of the body or agency in question. In the case of a County Board of Supervisors, this is the entire county.

(3) In determining whether an effect upon an official's economic interest will be "substantially" the same as an effect upon a "significant segment" of the public, it must first be determined what group is affected "in substantially the same manner" as the official's economic interest. That group must be analyzed to determine if it is both large in number and heterogeneous in quality as required in order for a group to constitute a "significant segment of the public."

(4) Kaiser will be affected in a manner distinguishable from the effect upon a significant segment of the public.

(5) Lastly, Supervisor Legan should disqualify himself from further activities in regard to his proposal for the Hillside Density Amendment.

Adopted by the Commission on August 20, 1985.  
Concurring: Chairman Stanford, Commissioners Lee, Montgomery and Roden. Absent: Commissioner Lemons.

  
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Dan Stanford  
Chairman